

State of New Hampshire Supreme Court

NO. 2019-0752

2020 TERM MARCH SESSION

In RE: Estate of Marie G. Dow

RULE 7 APPEAL OF FINAL DECISION OF THE
10TH CIRCUIT – PROBATE DIVISION – BRENTWOOD

BRIEF OF LESLIE DOW

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STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Marie Dow executed a will in Massachusetts, while a resident of Massachusetts. Marie left the entirety of her estate to her daughter-in-law, Leslie Dow. Marie also named Leslie Dow as personal and special representative of her estate. The will intentionally omitted to mention anyone not mentioned in the will. Marie specifically provided that her estate was to be administered and enforced according to the laws of the Commonwealth of Massachusetts. Last Will and Testament of Marie G. Dow, *Appx. At 9*.

The Circuit Court held that Marie Dow was domiciled in New Hampshire at the time of her death. Leslie Dow filed a MOTION FOR RECONSIDERATION ON ORDER AFTER HEARING ON MOTION TO ORDER THE FILING OF THE ORIGINAL WILL IN NEW HAMPSHIRE AND MOTION TO DETERMINE DOMICILE. *Appx. at 9*. That motion was denied.

The original will was filed and accepted for probate. Leslie Dow was appointed Executor of the Estate of Marie G. Dow. *Appx. At 9*. Christopher Dow filed a Motion to Determine Pretermitted Heir. *Appx. At 9*. The Circuit Court found that Christopher Dow was not a pretermitted heir. *Appx. At 9*. A motion for reconsideration was filed. *Appx. At 9*. That motion was denied, and Christopher Dow now brings this appeal.

SUMMARY OF ARGUMENT

Leslie Dow is the sole beneficiary of the Last Will and Testament of Marie G. Dow. Leslie reviews the relevant provisions of the will to determine Marie's intent, including the intentional omission of anyone not named in the will, and the choice of law provision contained in the will. Finally, Leslie applies Massachusetts law as it pertains to pretermitted heirs to the Last Will and Testament of Marie G. Dow.

ARGUMENT

1. The Intent of Marie G. Dow is clear from her Last Will and Testament

On June 30, 2014, Marie G. Dow, of North Andover, Massachusetts, executed her Last Will and Testament. Last Will and Testament of Marie G. Dow, *Appx.* at 9. Marie left the entirety of her probate estate to Leslie Dow, and also nominated Leslie as the Personal Representative and the Special Personal Representative of her estate. *Id.* Marie referred to Leslie as her daughter-in-law. Marie named her granddaughter, Courtney Labonte, as successor beneficiary, and successor Personal Representative. *Id.*

Article Eighth of Marie's will reads "I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized or possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament." *Id.*

It can be ascertained from the will itself that Leslie was married to a child of Marie Dow; that no children of Marie were named as beneficiaries; and that Marie did not intend for anyone other than Leslie Dow or Courtney Labonte to take anything under her will.

Marie's Will contained a choice of law provision. Article Ninth states that "My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts." *Id.*

This Court has enforced choice of law provisions on similar facts. In the case of In Re Farnsworth Estate, the testatrix died a domiciliary of New Hampshire, leaving a will drawn and executed in New York. In Re Farnsworth Estate, 109 NH 15 (1967). The will contained a choice

of law provision. *Id.* at 17. Recognizing that a choice of law provision is an expression of the testatrix's intent, the court found "It is well established law in this State that the intent of the testatrix as expressed in her will is to be given effect. This principle applies also to the determination of where and under the laws of what state the trusts created with the residue of her estate are to be administered." *Id.*

In Farnsworth, as in this case, it was the decedent's **will** that contained the choice of law provision. "Her will specifically provided that "the trusts created hereby shall be administered in the State of New York and shall be construed and regulated by the laws of the State of New York." *Id.*

This Court has held that "Our cases have continually emphasized that whenever possible maximum effect should be given to the testator's intent." In the Matter of Jackson, 117 N.H. 898.

II. Massachusetts law applies to the administration and enforcement of the estate

The Last Will and Testament of Marie G. Dow, Article Ninth, states that "My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts." Last Will and Testament of Marie G. Dow, *Appx.* At 9.

Choice of law provisions in wills are given effect in New Hampshire. In Farnsworth, the testatrix died a domiciliary of New Hampshire, leaving a will drawn and executed in New York. In Re Farnsworth Estate, 109 NH 15 (1967). Her will provided that the trusts created thereby would be construed and regulated by the laws of New York. *Id.* at 17. The Court gave effect to the choice of law provision in her **will**, and held that "the will has effectively removed these trusts from the jurisdiction of the Probate Court of the State of New Hampshire." *Id.* at 18.

In Royce v. Estate of Denby, the testatrix died a domiciliary of New Hampshire, and left a will drawn and executed in New York while domiciled in New York. Royce v. Estate of Denby, 117 N.H. 893 (1977). The will referenced the laws of the state of New York. *Id.* at 896. The Court held that New York law applied to determine pretermitted heir status where the testatrix indicated that she wanted New York law to apply regarding who would receive distributions under her will if her specific gifts failed. *Id.* The Court reasoned:

“Elizabeth Denby's will was drafted with reference to and executed under New York law and we must presume that it was executed with knowledge of said law and with intent to comply with it. As noted above, New York has no pretermitted-heir exception to the general principle that a person is deemed to know and intend all dispositions and omissions in her will. Thus, had Mrs. Denby never changed her domicile, there would be no question that Randolph Royce was not entitled to any part of her estate.” *Id.*

Similar to the facts in Denby, Marie Dow died a domiciliary of New Hampshire, after living there for approximately one year, leaving a will drawn and executed in Massachusetts, while a resident of Massachusetts. Last Will and Testament of Marie G. Dow *Appx.* at 9. Her will specifically provided that her “estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.” *Id.* Massachusetts also has no pretermitted-heir exception to the general principle that a person is deemed to know and intend all dispositions and omissions in her will. See M.G.L.A. c. 190B:2-302.

III. Christopher Dow is not a pretermitted heir under Massachusetts Law.

Under Massachusetts law, an omitted child takes only if the child was born or adopted after the execution of the will, except an omitted child born or adopted before the execution of

the will takes if the testator failed to provide for such child in the will because the testator believed the child was dead. M.G.L.A. c. 190B:2-302.

Applying M.G.L.A. c. 190B:2-302 to the Last Will and Testament of Marie G. Dow, Christopher Dow is not a pretermitted heir.

CONCLUSION


For the foregoing reasons, this Court should uphold the ruling of the NH 10th Circuit Court-Probate Division.

Respectfully submitted,
For Leslie Dow,

By her attorney:

Tyler Pentoliros
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P: 978-702-9231
F: 978-374-2277
Email: tylerpentoliros@gmail.com

Dated: April 25, 2020


Tyler Pentoliros, Esq.
Bar# 17739

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Attorney Tyler Pentoliros requests that he be allowed 15 minutes for oral argument.

I hereby certify a copy of this brief has been sent electronically to Nadine M. Catalfimo, Esq., and Lisa J. Bellanti, Esq., counsel for the appellant.

Dated: April 25, 2020


Tyler Pentoliros, Esq.

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Last Will and Testament

of

Marie G. Dow

I, **MARIE G. DOW**, of North Andover, Essex County, Commonwealth of Massachusetts, make this my last will and hereby revoke all earlier wills and codicils.

After the payment of my just debts, funeral expenses and expenses of administration, I give, devise and bequeath as follows:

FIRST: I may leave a memorandum stating my wishes with respect to the disposition of certain articles of personal property. Such memorandum, however, will be simply an expression of my wishes and shall not create any trust or obligation, nor shall it be offered for probate as a part of this will.

The decisions of my Personal Representative as to what is tangible personal property and other decisions made and actions taken by my Personal Representative in carrying out the provisions of this article shall be final and binding on all parties.

SECOND: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die, seized and possess, or to which I may be entitled at the time of my demise, wheresoever the same may be found (hereinafter called my "residuary estate"), I give, devise and bequeath to my daughter-in-law, **LESLIE DOW**, of Hampstead, New Hampshire.

If **LESLIE DOW** fails to survive me, then I hereby give, devise and bequeath my estate to my granddaughter, **COURTNEY LABONTE**, of Londonderry, New Hampshire.

THIRD: I nominate my daughter-in-law, **LESLIE DOW**, to be Personal Representative of this Will. I direct that my Personal Representative and Special Personal Representative, if any, be exempt from furnishing bond, or from giving surety on any bond required by law.

If **LESLIE DOW** is unable or unwilling to service, I hereby nominate my granddaughter,

Dennis M. Spurling, P.C.
The Wingate Building
21 Wingate Street
Haverhill, MA 01832
(978) 374-2230

COURTNEY LABONTE as Successor Personal Representative, and I hereby direct that she shall be exempt from furnishing bond, or from giving surety on any bond required by law.

Where appropriate in this Will, reference to Personal Representative shall include reference to Special Personal Representative; reference to the masculine shall include the feminine, and reference to the singular shall include the plural, and vice versa.

FOURTH: I hereby nominate and appoint my daughter-in-law, **LESLIE DOW**, as Special Personal Representative of this my Last Will and Testament. Said Special Personal Representative or her successor named herein shall be exempt from any surety on his bond. Said Special Personal Representative or her successor named herein shall have the same duties and responsibilities as the Permanent Personal Representative except therefrom those provisions of the law only acceptable to the Permanent Personal Representative. I hereby empower the Special Personal Representative or her successor to do whatever is legally necessary and proper before the final appointment of the Permanent Personal Representative.

FIFTH: My Personal Representative and Special Personal Representative, if any, shall have, in addition to, and not in limitation of all common law and statutory powers of the Commonwealth of Massachusetts including, but not limited to, G.L.c.190B, Sec. 3-715(2), or of any other jurisdiction whose laws apply to this Will, the following powers, without order or license of any Court:

- A. To sell, lease, or give options to purchase any real property or personal property of my estate at public or private sale, as such prices and upon such terms as my Personal Representative shall determine are fair and reasonable in relation to the property condition, the current market values, and any other pertinent factors.
- B. To employ or delegate as custodian, appraiser, broker, investment counsel, accountant, attorney of my estate and/or any other agent, such persons, firms or organizations, including my Personal Representative and/or any firm or organization of which my Personal Representative may be an employee or member, as my Personal Representative deems necessary or desirable; and to pay as an expense of my estate administration, the reasonable compensation of such persons, firms or organizations.

The decisions and actions of my Personal Representative shall be conclusive and binding. My Personal Representative shall be liable only for those acts or omissions made in bad faith, negligence or nonperformance of duty, willful misconduct or breach of fiduciary duty.

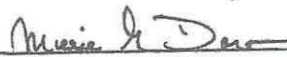
SIXTH: I request that my estate be subject to information administration with as little Court supervision as the law allows and that My Personal Representative not be required to render to any court annual or other periodic accounts, or any inventory, appraisal or other returns or reports. My Personal Representative shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as my Personal Representative shall determine. My Personal Representative shall pay the costs and expenses of any such action or proceeding, including (but not limited to) the compensation and expenses of attorneys and guardians ad litem, as an expense of administration.

SEVENTH: Any estate, inheritance or similar tax due as a result of my death with respect to property passing under my Will shall be paid from the residue of my estate as an expense of administration.

EIGHTH: I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.


NINTH: My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 30th day of June, 2014.


MARIE G. DOW

Signed, sealed, published and declared by said MARIE G. DOW as and for her Will in the presence of us two who at her request, in his presence and in the presence of one another subscribe our names hereunto as witnesses.

Dennis M. Spurling, P.C.
The Wingate Building
21 Wingate Street
Haverhill, MA 01832
(978) 374-2230


Witness: Dennis M. Spurling


Witness: Tyler Pentoliros

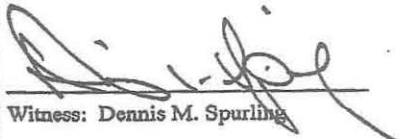
COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

June 30, 2014

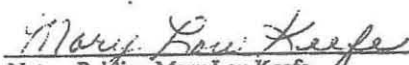
Before me, the undersigned authority, on this day personally appeared the Testatrix and the witnesses whose names are signed to the foregoing instrument, and, all of these persons being by me duly sworn, the Testatrix declared to me and to the witnesses in my presence that the instrument is her last Will and that she executed it as her free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence of the Testatrix, that he or she signed the Will as witness and that to the best of his or her knowledge, the Testatrix was eighteen years of age or over, of sound mind and under no constraint or undue influence.


MARIE G. DOW


Witness: Dennis M. Spurling


Witness: Tyler Pentoliros

Subscribed and sworn to before me by the said Testator and the said witnesses, this 30th day of June, 2014.


Notary Public: Mary Lou Keefe
My Commission Expires: 03/05/2015



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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

10th Circuit - Probate Division - Brentwood
PO Box 789
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Telephone: 1-855-212-1234
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<http://www.courts.state.nh.us>

Case Name: **Estate of Marie G. Dow**
Case Number: **318-2019-ET-00173**

**ORDER AFTER HEARING ON MOTION TO ORDER
THE FILING OF THE ORIGINAL WILL IN NEW HAMPSHIRE
AND MOTION TO DETERMINE DOMICILE**

I held a hearing on April 22, 2019 regarding the petitioner's motion to require the filing of an original will in New Hampshire as well as a motion to determine that the deceased was domiciled in New Hampshire at the time of her death. Appearing at the hearing were the heir and petitioner, Christopher Dow, and his counsel Attorney Catalfimo and Attorney Bellanti.

Although she filed an objection to the motion to file the will, neither Leslie Dow nor her counsel, Attorney Pentoliros, appeared for the hearing. Upon a review of the file, I note that Attorney Pentoliros received notice of the hearing by mail, and was served by mail with a copy of the motion to determine the decedent's domicile in New Hampshire and no objection was filed to that motion. Therefore, I find that the hearing was properly held and orders may issue on both matters.¹

The issues before the court arise from the fact that the petitioner, Christopher Dow, is the son of the deceased. The deceased died testate and the original will was believed to be in the possession of either the attorney of the deceased in Massachusetts (Attorney Dennis Spurling) or the named executrix under the will, Leslie Dow. Christopher Dow was omitted from the will, and he claims status as a pretermitted heir under New Hampshire law.

¹ It does not appear Attorney Pentoliros registered to receive notice of any electronic filings, even though he filed his appearance. He should note that he must register into the e-filing system to receive notices of electronic filings. In this case, he received notice of the hearing and the motion regarding domicile by mail.

Counsel for Christopher Dow attempted to obtain the will from Attorney Spurling but was unable to do so. Attorney Spurling filed the will in Massachusetts without seeking to open a probate of the estate. Attorney Catalfimo reports that when she contacted the Clerk of the Essex Probate and Family Court, she was told that the will would be rejected because the death certificate indicated that the deceased died as a resident of New Hampshire. However, the will was to be released only to Attorney Spurling since he was the one who filed it with the court.

After unsuccessfully attempting to obtain the original copy of the will from Attorney Spurling, Attorney Catalfimo filed a petition for estate administration in New Hampshire on behalf of Christopher Dow on January 29, 2019. This court ordered that the petition would not be acted upon without the original will. Thereafter, the petitioner filed a motion to require Leslie Dow or Attorney Spurling to file the original will with this court.

Ms. Dow filed an objection to the motion. She noted in her objection that she had filed the original will for probate in Massachusetts on February 7, 2019. She further claimed that the deceased was domiciled in Massachusetts at the time of death, even though she was living in an assisted living facility in New Hampshire, and had been for approximately a year.

Ms. Dow argued that the deceased had sold her home in Massachusetts on November 6, 2018, and was in the process of purchasing a unit at an assisted living facility in Massachusetts when she passed. She died on November 20, 2018 while still living in New Hampshire. There is no evidence of a purchase agreement for a unit in Massachusetts, or anything else before the court showing that she was in the process of moving other than Leslie Dow's statements in her objection. At the time of her death, the deceased is believed to have had limited personal property, with nearly all of it in New Hampshire.

The petitioner also informed the court that he had filed a motion to dismiss the probate administration in Massachusetts. The petitioner cited Massachusetts General Laws 190B:3-202 in his memo to this court, relying on the provision that the courts of Massachusetts will defer to the ruling of the courts of another state regarding domicile when the petition for administration was first filed in the other state.

Here, the evidence shows that the petition for estate administration was first filed in New Hampshire. Moreover, the deceased had lived in New Hampshire for approximately one year, and had sold her home in Massachusetts. Although Ms. Leslie Dow argues that the deceased intended to return to Massachusetts, there is no evidence of that fact. Instead, the deceased and nearly all of her property were in New Hampshire.

This court has jurisdiction to probate the estate of a deceased who was an inhabitant of the State of New Hampshire at the time of death. RSA 547:8. Pursuant to RSA 21:6, an inhabitant of New Hampshire includes a person who is "domiciled or has a place of abode or both in this state...and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others."²

In this case, the evidence is that the deceased moved to New Hampshire approximately one year before her death. She sold her property in Massachusetts, and there was no evidence before the court of any intention to move back to Massachusetts except for the pleadings of Leslie Dow. The death certificate listed the decedent as residing in Salem, New Hampshire at the time of death. The decedent's personal property, then, was located in New Hampshire at that time as well.

Given all of these factors, I find that the decedent was an "inhabitant" of the state of New Hampshire at the time of death as she resided in New Hampshire, and was domiciled here at that time. I note that even if the deceased was considering moving back to Massachusetts, there is no evidence of when that was likely to occur. Therefore, the decedent was in New Hampshire for the indefinite future as she had no finite plans as to when or how she might return to Massachusetts, if indeed she wished to do so.

² This statute was amended effective July 1, 2019. Since the deceased passed in 2018 and the estate was filed prior to the effective dates of the amendments, I am applying the statute as it exists at this time to this case.

Therefore, the petitioner's motion to find that the deceased was domiciled in New Hampshire at the time of death is granted. Moreover, the court's prior order to Leslie Dow and Attorney Spurling to file the original will in New Hampshire remains in effect. They shall have 30 days from the date of the clerk's notice of this order to file the original will in this court.

Ordered by the Court:

April 24, 2019
Date


Judge Mark F. Weaver

TYLER PENTOLIROS
ATTORNEY AT LAW

THE WINGATE BUILDING · 21 WINGATE STREET · HAVERHILL, MA 01832
TEL: 978-702-9231

May 6, 2019

RE: Estate of Marie G. Dow
Docket #: 318-2019-ET-00173

Dear Clerk,

Please find enclosed Leslie Dow's MOTION FOR RECONSIDERATION ON ORDER AFTER HEARING ON MOTION TO ORDER THE FILING OF THE ORIGINAL WILL IN NEW HAMPSHIRE AND MOTION TO DETERMINE DOMICILE in the above captioned matter, with affidavit in support of the same.

Sincerely,


Tyler Pentoliros

STATE OF NEW HAMPSHIRE
10TH CIRCUIT COURT

PROBATE DIVISION
Docket #: 318-2019-ET-00173

**MOTION FOR RECONSIDERATION ON ORDER AFTER HEARING ON
MOTION TO ORDER THE FILING OF THE ORIGINAL WILL IN NEW
HAMPSHIRE AND MOTION TO DETERMINE DOMICILE**

NOW COMES Leslie Dow, the Personal Representative of the Estate of Marie Dow, and asks that this Honorable Court RECONSIDER its order dated April 24, 2019, and states the following:

FACTS

1. Leslie Dow is the Personal Representative and sole beneficiary of the Last Will and Testament of Marie G. Dow.
2. A Petition for Informal Probate and Appointment of Personal Representative was filed on January 11, 2019, prior to the initiation of any proceeding in New Hampshire. (see attached Enclosure Letter and printout from masscourts.org website, indicating a filing date of January 11, 2019, DOCKET # ES19P0210EA.)
3. The petition for the formal probate of the Estate of Marie G. Dow was accepted on February 7, 2019 at the Essex County Probate and Family Court in Salem, Massachusetts.
4. Marie G. Dow was a lifelong resident North Andover, Massachusetts.

5. An Affidavit of Domicile was filed with Essex County Probate Court indicating that Marie G. Dow had sold her home in North Andover, Massachusetts, on November 6, 2018, and was in the process of purchasing a unit at Edgewood Assisted Living Facility, when she passed away on November 20, 2018.
6. At the time of her death, Marie G. Dow had been staying at the Residence at Salem Woods, Salem, New Hampshire, an assisted living facility, for the period between December 31, 2017, and the date of her passing, November 20, 2018, a period of less than eleven months.
7. Marie G. Dow filed her last income tax return for the year 2018 indicating that her residence was in North Andover, Massachusetts, where she had resided since 1991.
8. Marie G. Dow's vehicle was last registered in Massachusetts.
9. The Last Will and Testament of Marie G. Dow left the entirety of her estate to her daughter-in-law, Leslie Dow, with a successor interest in her granddaughter, Courtney Labonte.
10. The Last Will and Testament of Marie G. Dow, paragraph EIGHTH, specifically omits any person not mentioned in the instrument.
11. The Last Will and Testament of Marie G. Dow, paragraph NINTH, records that her estate was to be administered and enforced according to the laws of Massachusetts.

ARGUMENT

The last wishes of Marie Dow, the testator, should not be undermined by the unfortunate circumstances surrounding the end of her life.

Marie Dow was born in Lawrence, Massachusetts, and lived her entire life in the Merrimack Valley area of Massachusetts. At the age of 86, unable to find an assisted living facility to that met her needs in Massachusetts, she moved to the Residence at Salem Woods, in Salem, New Hampshire. She lived there for less than eleven months before she passed away. She never changed her domicile for tax purposes; nor did she amend her residence on her driving license. Her Massachusetts home was sold on November 2, 2018, less than one month before died.

Marie Dow did make specific plans on how her estate was to be administered after she was gone. On June 30, 2014, Marie executed her Last Will and Testament, leaving the entirety of her estate to her son's then ex-wife, Leslie Dow.

Marie was estranged from her sons. She had no contact with them for the years leading up to her death. Marie's sons were not pretermitted heirs. They were intentionally omitted children.

Marie's Last Will and Testament specifically stated "EIGHTH: I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my Last Will and Testament" AND, that "NINTH: My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts."

Given the specificity and clarity with which Marie articulated her last wishes, naming Leslie Dow as sole beneficiary and Personal Representative and specifically omitting all others not named, and clearly expressing that her estate was to be enforced and administered according

to the laws of Massachusetts, this Court should exercise its equitable powers under RSA 547:3-b and find that the Estate of Marie Dow should be administered in Massachusetts.

Marie Dow lived for eighty-six YEARS in Massachusetts. On June 30, 2014, she executed her Last Will and Testament in Massachusetts, stating it was to be administered and enforced according to the laws of Massachusetts. Eleven MONTHS before she died, she moved to an assisted living facility in Salem, New Hampshire. Her home in Massachusetts was sold less than one month before her passing.

Proceedings In the Matter of the Estate of Marie G. Dow were begun on the filing date of January 11, 2019, prior to the initiation of any proceeding in New Hampshire, as evidenced by the documents indicating such and attached hereto. Because the action was first initiated in Essex County Probate and Family Court, the determination of domicile in that proceeding will be accepted as determinative in that proceeding. (See M.G.L. c. 190B s. 3-202.)

In spite of the above, the Petitioner seeks to have this Court establish domicile and require the probate of Marie's estate in New Hampshire.

The laws of the State of New Hampshire are not meant to subvert the will of the testator. Seeking to have Marie Dow's domicile established in New Hampshire and her will subsequently administered there is an attempt to undermine the last wishes of Marie Dow. This Court should exercise its equitable powers to prevent that from happening.

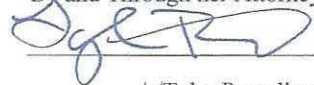
WHEREFORE, the Leslie Dow, the Personal Administrator of the Estate of Marie G. Dow, respectfully requests that this honorable Court:

- A. Reconsider its ruling of April 24th, 2019; and
- B. Deny the Motion to Order the Filing of Original Last Will of Marie G. Dow dated June 30, 2014 With This Court; and
- C. Grant a further hearing on this matter; and
- D. Allow the matter proceed in Massachusetts;
- E. Grant such other relief as the Court deems just and fair.

Respectfully Submitted,

Leslie Dow,

By and Through her Attorney



/s/Tyler Pentoliros

Tyler Pentoliros

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CERTIFICATE OF SERVICE

I hereby certify that the above has been this 6th day of May, 2019 been E-filed and mailed to:

Attorney Nadine Catalfimo 282 Main St, Salem, NH 03079.

Courtney Labonte 25 High Range Road Londonderry, NH 03053

Harry R. Dow, IV 21 Oak Street Clinton, MA 01510

Christopher Dow 25 Equestrian Road Salem, NH 03079

Attorney Lisa Bellanti 459 Lafayette Road Hampton, NH 03842



Tyler Pentoliros

AFFIDAVIT OF TYLER PENTOLIROS IN SUPPORT OF
MOTION FOR RECONSIDERATION ON ORDER AFTER HEARING ON
MOTION TO ORDER THE FILING OF THE ORIGINAL WILL IN NEW
HAMPSHIRE AND MOTION TO DETERMINE DOMICILE

1. My name is Attorney Tyler Pentoliros.
2. I represent Leslie Dow in matters proceeding in this court.
3. On March 8, 2019 I entered my appearance on behalf of Leslie Dow.
4. I entered that appearance electronically.
5. It was accepted and appeared on the E-File site.
6. That Appearance contained my email address.
7. I believed that I had properly logged in so that I would receive all notices by email.
8. I never received notice of the hearing on April 22, 2019, electronically or otherwise.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 6TH DAY OF MAY, 2019.



Tyler Pentoliros

On this 6 day of May, 2019, before me, the undersigned notary public, personally appeared **Tyler Pentoliros**, proved to me through satisfactory evidence of identification to be the person whose name is signed on the preceding document, and acknowledged to me that they signed it voluntarily for its stated purpose.



Notary Public

My Commission Expires



SHANNON J. RYAN
Notary Public
Commission Expires July 4, 2025

EX. A

DENNIS M. SPURLING, P.C.
ATTORNEY AT LAW
THE WINGATE BUILDING
21 WINGATE STREET
HAVERHILL, MASSACHUSETTS 01830

TELEPHONE
(978) 374-2230

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www.dennismspurling.com

December 31, 2018

Essex Probate and Family Court
36 Federal Street
Salem, MA 01970

RE: Estate of Marie G. Dow

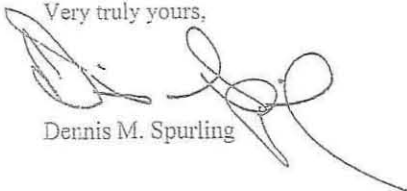
Dear Sir/Ms:

In regard to the above-referenced matter, please find enclosed the following:

1. Petition for Informal Probate of Will and Appointment of Personal Representative;
2. Certified Death Certificate of Marie G. Dow;
3. Last Will and Testament of Marie G. Dow;
4. Surviving Spouse, Children, Heirs at Law Form;
5. Devisees Form;
6. Bond;
7. Military Affidavit;
8. Notice of Informal Probate;
9. Affidavit of Domicile;
10. Order of Informal Probate of Will and/or Appointment of Personal Representative;
11. Filing Fee.

Please file. Thank you for your assistance in this matter.

Very truly yours,



Dennis M. Spurling

DMS/mlk
Enclosures

Docket #
ES19P0210EA

4/18/2019

Case Details - Massachusetts Trial Court 5

<u>SA/Subject #</u>	<u>Status Date</u>	<u>Pleading Party</u>	<u>Responding Party</u>	<u>Status</u>	<u>Description</u>
2	02/07/2019	Dow, Leslie	Dow, Marie G	Active	S/A - Formal Probate of Will with Appointment of Personal Representative

Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
05/28/2019 08:30 AM	Judge Bisenius Lawrence Session	2 Appleton Street, Lawrence	Motion	Bisenius, Hon. Theresa A	

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
01/24/2019	Will of Marie G. Dow (4 pgs)	1
02/01/2019	Petition for Informal Probate	2
02/01/2019	Surviving Spouse, Children, Heirs at Law	10
02/01/2019	Devises	11
02/01/2019	Temporary Bond Without Sureties Filed	12
02/01/2019	Return of Service on Notice of Informal Probate	13
02/01/2019	Affidavit of Domicile	14
02/01/2019	AMENDED Affidavit as to Military Service	15
02/07/2019	Petition for Formal Probate	3
02/07/2019	Surviving Spouse, Children, Heirs at Law	4
02/07/2019	Devises	5
02/07/2019	Permanent Bond Without Sureties Filed	6
02/07/2019	Affidavit Of Domicile	7
02/07/2019	Amended Affidavit as to Military Service	8
02/07/2019	Uniform Counsel Certification Form Filed by	9
	Applies To: Spurling, Esq., Dennis M (Attorney) on behalf of Dow, Leslie (Petitioner)	
02/08/2019	NOTICE: Citation on Petition for Formal Adjudication Issued.	
02/11/2019	Filed with Registry	
03/07/2019	Citation Filed; Served as Ordered	16
03/21/2019	Notice of Appearance and Objection	17

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Active		Bisenius, Hon. Theresa A
Accepted for Filing	02/11/2019	

4/18/2019 **ET. 5**

Case Details - Massachusetts Trial Court 5

[Skip to main content](#)

ES19P0210EA In the matter of: Dow, Marie G

• Case Type
 • Estates and Administration
 • Case Status
 • Closed
 • File Date
 • 01/11/2019
 • DCM Track:
 • Initiating Action:
 • Filing of will of deceased no petition
 • Status Date:
 • 02/11/2019
 • Case Judge:
 • Next Event:
 • 05/28/2019
 • **Property Address**
 01845

[All Information](#)
[Party](#)
[Subsequent Action/Subject](#)
[Event](#)
[Docket](#)
[Disposition](#)

Party Information

Dow, Marie G
- Decedent

- DOD
- 11/20/2018

Alias

Party Attorney

[More Party Information](#)

Dow, Leslie
- Petitioner

- DOD
-

Alias

Party Attorney

- Attorney
- Spurling, Esq., Dennis M
- Bar Code
- 476020
- Address
- Dennis M Spurling P.C.
- 21 Wingate St
- Haverhill, MA 01832
- Phone Number
- (978)374-2230

[More Party Information](#)

Dow, Leslie
- Proposed Fiduciary

- DOD
-

Alias

Party Attorney

[More Party Information](#)

Subsequent Action/Subject

SA/Subject #	Status Date	Pleading Party	Responding Party	Status	Description
1	02/01/2019	Dow, Leslie	Dow, Marie G	Active	S/A - Informal Probate of Will with Appointment of Personal Representative

https://www.masscourts.org/eservices/search.page.7?x=smrmJQawIBc1jM1q9UXT5TA0db8paxyCjCtevFlaGf3cblpEiXolP1QehehscGSImK*31cfWnUV... 1/2

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

10TH CIRCUIT COURT- PROBATE
DIVISION – BRENTWOOD

ESTATE OF MARIE G. DOW

CASE NO. 318-2019-ET-00173

**MOTION TO DETERMINE CHRISTOPHER DOW IS A PRETERMITTED HEIR
OF MARIE G. DOW**

NOW COMES, Christopher Dow, Petitioner, by and through his attorneys,
Nadine M. Catalfimo and Lisa J. Bellanti, and files this motion and states as
follows:

1. On January 29, 2019 Christopher Dow, as Petitioner, filed a Petition for Administration with this court for the above referenced estate.
2. On April 22, 2019 a hearing was held before this court and orders were issued holding that Marie G. Dow (hereinafter the "Decedent") was domiciled in the State of New Hampshire at the time of her death and that the Decedent's property was located in the State of New Hampshire. See Order After Hearing on Motion to Order the Filing of the Original Will in New Hampshire and Motion to Determine Domicile dated April 24, 2019.
3. The original Last Will and Testament of Marie G. Dow dated June 30, 2013 (hereinafter "Last Will") was executed in the Commonwealth of Massachusetts and as such said Last Will is a foreign will filed for probate in New Hampshire.
4. The Decedent was a widow and was survived by two living adult children, namely Christopher Dow and Harry R. Dow, IV, at the time of her death. The Decedent was also survived by her ex daughter-in-law, Leslie Dow.

5. The Last Will does not make any reference whatsoever to Christopher Dow.
6. The Last Will does not make sufficient reference to a class which would include her children, such as "children," "issue" or "legal heirs." See In re Estate of Guy C. Came, 129 N.H. 544, 549 (1987), citing In the matter of Jackson, 117 N.H. 898, 900 (1977); and Smith v. Smith, 72 N.H. 168, 169 (1903); and In re Estate of MacKay, 121 N.H. 682, 684 (1981).
7. Paragraph Second of the Last Will omits any mention to the decedent's children entirely and leaves the Decedent's entire probate estate to Leslie Dow.
8. Paragraph Eighth of said Last Will provides as follows:

I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.
9. Paragraph Ninth of said Last Will provides as follows:

My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.
10. RSA 551:10 provides "... every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate."

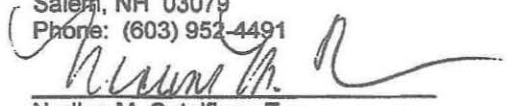
11. If the Decedent died intestate then her entire estate would pass to the decedent's children, Christopher Dow and Harry R. Dow, IV, in equal shares, pursuant to the provisions of RSA 561:1, II. (a).

WHEREFORE, Christopher Dow, by and through his attorneys, requests this Honorable Court:

- A. Determine that Christopher Dow is a pretermitted heir under the Last Will and Testament of Marie G. Dow dated June 30, 2014 pursuant to RSA 551:10;
- B. Order that Christopher Dow receives one-half of the Decedent's probate estate as if the Decedent died intestate pursuant to RSA 561:1 and RSA 561:17; and
- C. Grant such other and further relief as this Honorable Court deems fair and just.

Respectfully submitted,
for Christopher Dow,
By his attorneys:

Nadine M. Catalfimo, Esq.
282 Main Street, Suite 211
Salem, NH 03079
Phone: (603) 952-4491



Nadine M. Catalfimo, Esq.
NH Bar No. 18149

Lisa J. Bellanti, Esq.
Cassassa Law Office
459 Lafayette Road
Hampton, NH 03842

Lisa J. Bellantini, Esq.
NH Bar No. 13792

CERTIFICATE OF SERVICE

I, Nadine M. Catalfimo, Attorney for Christopher Dow, hereby certify that I sent a copy of the foregoing by U.S. mail, first class, on August 13, 2019, to all of the following interested parties:

Courtney LaBonte
25 High Range Road
Londonderry, NH 03053

Harry R. Dow, IV
21 Oak Street
Clinton, MA 01510

Christopher Dow
25 Equestrian Road
Salem, NH 03079

Tyler Pentoliros, Esq.
21 Wingate Street
Haverhill, MA 01832

Nadine M. Catalfimo, Esq.
NH Bar Id. No. 18149

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

10th CIRCUIT COURT- PROBATE
DIVISION – BRENTWOOD

ESTATE OF MARIE G. DOW

CASE NO. 318-2019-ET-00173

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DETERMINE
CHRISTOPHER DOW IS A PRETERMITTED HEIR OF MARIE G. DOW**

NOW COMES, Christopher Dow, by and through his attorneys, Nadine M. Catalfimo and Lisa J. Bellanti, and submits this memorandum of law in support of the Motion to Determine Christopher Dow as a Pretermitted Heir of Marie G. Dow pursuant to RSA 551:10 and RSA 561:17, and submits the following to this court:

I. Factual Background:

Marie G. Dow (hereinafter the "Decedent") died on November 20, 2018, a resident of Salem, County of Rockingham, State of New Hampshire. The Decedent was a widow at the time of her death and was survived by her two adult sons, namely Christopher Dow and Harry R. Dow, IV. It is undisputed that the Decedent rented and lived in Apartment No. 118, at The Residence of Salem Woods, 6 Sally Sweets Way, Salem, New Hampshire, for approximately one year prior to her death and was a resident of the State of New Hampshire.

The Decedent died from breast cancer.

The Decedent was a former resident of the Commonwealth of Massachusetts. The Decedent did not own any personal or real estate in the Commonwealth of Massachusetts at the time of her death and she did not

maintain a residence in the Commonwealth of Massachusetts at the time of her death.

The Decedent previously resided at 200 Bridle Path, North Andover, County of Essex, Massachusetts, which was sold prior to her death.

Leslie Dow is the nominated Executrix/Personal Representative of the Estate of the Decedent and the sole beneficiary of the Estate of the Decedent under the terms of Paragraph Second of the Last Will and Testament of Marie G. Dow dated June 30, 2014 (hereinafter referred to as the "Last Will"). Said Last Will was witnessed by Dennis Spurling, Esq. and Tyler Pentoliros, Esq. on June 30, 2014, and was executed in the Commonwealth of Massachusetts where the Decedent resided at the time of its execution, pursuant to the laws of the Commonwealth of Massachusetts. A review of the Last Will indicates that Dennis Spurling, Esq. was the attorney that drafted the Last Will. It is undisputed that the Last Will was executed in conformity with Massachusetts law.

Said Last Will makes no reference to the Decedent's children, Harry R. Dow, IV. and Christopher Dow, and makes no reference to any class that would include the Decedent's children as beneficiaries.

Paragraph Eighth of the Last Will provides as follows:

I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.

Paragraph Ninth of the Last Will provides as follows:

My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.

Christopher Dow filed a Petition for Administration with this court on January 29, 2019.

On February 1, 2019 and February 7, 2019, Leslie Dow, as Petitioner, filed a Petition for an Informal Probate of the Will and for the Appointment of Personal Representative and a Petition for Formal Probate of the Will and for the Appointment of Personal Representative, respectively, with the Essex Probate and Family Court, Commonwealth of Massachusetts, Docket No. ES-19P021EA. Christopher Dow challenged the jurisdiction and venue of the Essex Probate and Family Court regarding both petitions filed by Leslie Dow based on the Decedent's domicile being the State of New Hampshire at the time of her death, and filed a Motion to Dismiss both the informal and formal petitions for the probate and appointment of Personal Representative. After a hearing on May 28, 2019, at the Essex Probate and Family Court, said court granted the Motion to Dismiss both the informal and formal petitions, and issued Judgment of Dismissals, without prejudice, dated June 28, 2019, for said informal and formal petitions for probate.

After a hearing held on April 22, 2019, on the determination of the domicile of the Decedent, this court entered an Order After Hearing on Motion to Order the Filing of the Original Will in New Hampshire and Motion to Determine Domicile dated April 24, 2019, holding that Marie G. Dow was an "inhabitant" of

New Hampshire, was domiciled in New Hampshire, and that her personal property at the time of her death was thus located in the New Hampshire.

ARGUMENT:

II. RSA 551:10 - Pretermisison of Heirs under New Hampshire law

RSA 551:10 provides as follows:

Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.

The NH Supreme Court explained in the case of In Re Estate of Guy C. Came, 129 N.H. 554, 546 (1987) "that the statute [RSA 551:10] sets forth three requirements that are applicable...the fulfillment of which will result in a finding of pretermisison: the child is (1) not named in the will, (2) not referred to in the will; and (3) not a devisee or a legatee under the will," citing C. DeGrandpre, 7 New Hampshire Practice, Wills, Trusts and Gifts §372 (1986). In this case, it is undisputed that the son of the Decedent, Christopher Dow, is not specifically named in the Decedent's Last Will, is not referred to in the Last Will and is not a devisee or legatee under the Last Will. The NH Supreme Court explained in Came that "the effect of the statute is to create a **conclusive rule of law** that pretermisison of a child is accidental, unless the testator devises or bequeaths property to the child or names or refers to the child in the will," [emphasis added], citing In re Estate of MacKay, 121 N.H. 682, 684 (1981); Royce v. Estate of Denby, 117 N.H. 893, 896 (1977). The court went on to explain that the statute

"will be upheld even if the testator's intent is defeated as a result" [emphasis added], citing In the Matter of Jackson, 117 N.H. 898, 903 (1977).

The NH Supreme Court has also held that RSA 551:10 does not create a presumption that the pretermission of a child or issue is accidental, but a "rule of law." [Emphasis added], See In Re Estate of Mackay, 121 N.H. 682, 684 (1981) (citations excluded). The court in Mackay explained that unless there is evidence within the "four corners" of the Will itself, this rule is conclusive. *Id.* at 684. The court's explanation of the pretermission rule of law in Mackay was stated as follows:

"Our cases have continually emphasized that whenever possible maximum effect should be given to the testator's intent...The formal requirements of RSA 551:10 may in some cases operate to defeat a testator's intent. However, this does not permit us to formulate a rule different from that laid down in the statute. Accordingly, our task is not to investigate the circumstances to divine the intent of the testator; rather, it is to review the language contained within the **four corners** of the will for a determination of whether the testator named or referred to the [omitted children]." [Emphasis added] *Id.* at 684.

A review and reading of the Last Will in this case reveals an absence of any mention of, or reference to, the Decedent's son, Christopher Dow.

**III. Extrinsic Evidence Regarding Testator's Intent to Exclude Heirs is not
allowed under New Hampshire law**

In Jackson, the NH Supreme court reviewed the issue of whether extrinsic evidence should be allowed to determine a Testator's intent to exclude heirs under a Testator's Will. In Jackson, there were three adopted children from a first marriage who were excluded from their father's Will and they were not referred to or mentioned under his Last Will and Testament. On appeal from a Grafton Probate and Family Court decision, the guardian ad litem for the three adopted children of the Mr. Jackson claimed the adopted children were entitled to take the estate as pretermitted heirs under RSA 551:10. The attorney who prepared the Last Will of Thomas Jackson testified to the probate court, over objection, regarding his discussions with Mr. Jackson to intentionally exclude his adopted children from his Last Will and his intent to leave everything to his brother and sister, equally. The brother and sister of Mr. Jackson argued to the NH Supreme Court that when extrinsic evidence indicates that the omission to provide for the adopted children was intentional, the court should not allow the statute to defeat the Testator's intent. Jackson at 902. The NH Supreme Court disagreed.

The NH Supreme Court in Jackson explained that allowing extrinsic evidence to defeat the statute would require the NH legislature to redraft the statute in order to adopt the position of allowing extrinsic evidence. The court went on to explain the "rule of law," as explained in the Came decision, explaining "the statute was designed to lay down a clear, distinct and

perspicuous rule, that no testator should be understood to intend to disinherit one of his children or grandchildren....upon any less clear evidence than his actually naming or distinctly referring to them personally so as to show that he had them in his mind" *Id.* at 903 [citations omitted]. The court went on to explain that the terms of the RSA 551:10 do not allow the admissibility of extrinsic evidence to defeat the language of the statute, even when the extrinsic evidence shows the Testator's intent is to exclude a beneficiary. *Id.* at 903.

In the case at bar, Leslie Dow is barred by New Hampshire law from admitting any extrinsic evidence, including the testimony of the Decedent's attorney and/or the witnesses to the Last Will of Marie G. Dow, regarding the intent of Marie G. Dow to exclude any heirs from inheriting from her estate upon her death. The NH Supreme Court has clearly held that any such extrinsic evidence beyond the "four corners" of the Last Will of a Testator is not admissible to defeat the statutory language of RSA 551:10.

IV. The Reference in the Last Will to "person" or "persons" is not sufficient to exclude the Grantor's son, Christopher Dow, as an heir of the Estate

It is well settled under New Hampshire common law what constitutes a sufficient reference to a beneficiary, or a reference to a class to preclude the application of RSA 551:10. In this case, there is no direct reference to Christopher Dow, nor is there a reference to him as "issue" of the decedent, or as a "child" or "children" of the decedent within the four corners of the Last Will of the Decedent. Paragraph Eighth of the Last Will provides, in pertinent part, that

the Decedent "intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized or possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my Last Will." [Emphasis added]

The NH Supreme Court has addressed what constitutes a sufficient reference to a class to exclude a child of the Testator in several cases. The court explained In re Estate of Guy C. Came, 129 NH 544, 549 (1987), that a reference to a class described as "children" or "issue," whether or not a bequest is made to them, may be sufficient to prevent the application of the statute," citing In the Matter of Jackson, 117 NH 898, 900-901 (1977); and Smith v. Smith, 72 NH 168, 169 (1903). In the Came decision, the NH Supreme Court explained that a reference to "legal heirs" was held in one case to be a sufficient a reference to the children the testator's who were excluded under a will, *Id.* at 549, citing Smith v. Sheehan, 67 NH 344, 347-48 (1892). The NH Supreme Court also held in the case of In Re Estate of MacKay, 121 NH 682, 684-85 (1981), that a reference to "heirs at law" or "next of kin" was not a sufficient reference to exclude the daughter of the Testator from his first marriage, even though the excluded child was an heir at law under the default provisions of the Testator's Will.

In this case, it cannot be gleaned from a reading of the four corners of the Last Will that the Decedent intended to include her son, Christopher Dow, as a "person" or "persons" and further, to exclude him under her Last Will when there is no direct mention of him. The class reference of "person" or "persons" is too broad and vague to conclude that she had him in mind when she executed her

Last Will. A ruling that the provisions of Paragraph Eighth sufficiently exclude Christopher Dow would defeat a long line of common law cases in New Hampshire interpreting the rule of law in RSA 551:10, which requires a more specific reference to a class or a direct reference to the excluded heir under the terms of a will.

V. Massachusetts law regarding pretermission of an heir

The Massachusetts Uniform Probate Code Chapter §190B:2-302 (b) controls the omission of children in a testator's Will under Massachusetts law and provides that it must "appear from the will that the omission was intentional."

Massachusetts common law requires "the proponent of the will to prove the omission was intentional and not occasioned by accident or mistake." See Draper v. Draper, 267 Mass 528, 531 (1929). Unlike New Hampshire law, there is no automatic rule of law or presumption in Massachusetts. The testator's intent "may appear from any language in the will which states or implies it; or if there is no such language in the will, it may be proved by any appropriate evidence." See Jones v. Jones, 297 Mass 198, 208 (1937). Whether the omission of a child was intentional is a question of fact and extrinsic evidence is admissible in the courts in Massachusetts to determine whether the omission was the product of a mistake or accident." Draper v. Draper, supra at 532. The court in the Commonwealth will make its determination either from the direct wording in the will or from extrinsic evidence outside of the will. See Branscombe v. Jenks, 7 Mass.App.Ct. 897, 897 (1979).

Allowing extrinsic evidence in this case would be a direct contradiction of the precedent set forth by many NH Supreme Court cases holding that no extrinsic evidence is allowed in determining the intent of the Testator to determine whether a child was omitted intentionally when there is no direct mention of the child in the will or the mention of a "class" that the child would belong to, such as "children." As mentioned above in Paragraph III., allowing extrinsic evidence would frustrate the New Hampshire legislature's intent for a presumption and the automatic "rule of law" that requires only a reading of the four corners of the Will.

VI. The Decedent's real and personal property descends according to the laws of New Hampshire when the Decedent was domiciled in New Hampshire at death, when there is a conflict of law between states and a foreign Will is submitted to probate in New Hampshire

Under New Hampshire law, "a decedent's personal property passes according to the law of the state of domicile." See In Re Estate of Rubert, 139 NH 273, 276 (1994), citing Eyre v. Storer, 37 NH 114, 120 (1858); and French v. Short, 207 Va. 548, 151 S.E. 2d 354, 356-57 (1966). Because the Decedent in this case did not own any real estate at the time of her death in either Massachusetts or New Hampshire, the application of RSA 551:10 to pretermitted heirs as it relates to real estate is inapplicable.

In Rubert, the excluded heir argued that the New Hampshire pretermittance statute was inapplicable to property located in New Hampshire when a foreign Will was created in the State of Virginia and when the Testator was domiciled in

Virginia "because the decedent intended to disinherit the [pretermitted heir]." *Id.* at 277. Under Virginia law, the excluded heir would not be pretermitted. The court in Rubert explained that Mr. Rubert had an opportunity to change his Will after relocating and should have done so, so that his Will complied with the law of his new domicile. *Id.* at 277.

Mr. Rubert and his wife originally lived in Dunbarton next door to their daughter while their son lived in Virginia. See In re Estate of Rubert, 139 N.H. 273, 274 (1994). Mrs. Rubert was ill and her doctors were located in Virginia. *Id.* Mr. and Mrs. Rubert moved to Virginia and leased an apartment together in a retirement facility. *Id.* Shortly after moving, Mrs. Rubert passed away and Mr. Rubert leased a different unit in a different retirement facility in Virginia where he resided after his wife's death. *Id.* Just before taking a trip to visit New Hampshire, Mr. Rubert's attorney was unable to have his new Will ready, so Mr. Rubert prepared a holographic Will. *Id.* While he was visiting his daughter in New Hampshire, he passed away in New Hampshire, owning real estate in New Hampshire. His new Will excluded his daughter and left his entire estate to his son, with no mention of his daughter. *Id.*

The issue of domicile was litigated first in Virginia which determined that Mr. Rubert was in fact domiciled in the State of Virginia. *Id.* at 277. The foreign Will of Mr. Rubert was submitted to probate in New Hampshire. *Id.* In the New Hampshire estate administration proceeding, where the Will was filed for probate as a foreign Will, the daughter contested the Will and relitigated the issue of domicile. *Id.* The Merrimack County Probate Court held that Mr. Rubert was

domiciled in New Hampshire at the time of his death and that his real and personal property descended pursuant to the pretermisison statute, RSA 551:10. On appeal, the NH Supreme Court reversed in part the probate court's finding that the decedent was domiciled in New Hampshire and held Mr. Rubert was domiciled in Virginia and that only Mr. Rubert's real estate in the State of New Hampshire would be subject to the provisions of RSA 551:10, despite Mr. Rubert's intent to exclude his daughter under Virginia law where he was domiciled at the time of his death and where he executed his Last Will pursuant to Virginia law. The NH Supreme court explained that the full faith and credit clause prevented the parties from relitigating the issue of domicile in New Hampshire, which was a factual issue previously determined by the Virginia courts, and merited full faith and credit to that court's determination of domicile. *Id.* at 276.

In Rubert, the NH Supreme Court again upheld its strong policy in favor of protecting pretermitted heirs, and explained that RSA 551:10 warranted application to the real property of Mr. Rubert which was located in the State of New Hampshire at the time of his death, even though the Will was executed in Virginia, and submitted to probate in New Hampshire, and when the daughter was a pretermitted heir only under New Hampshire law. *Id.* at 276. Since the NH Supreme Court determined that Mr. Rubert was domiciled in Virginia, the court held that his personal property rightfully descended pursuant to the laws of Virginia. *Id.*

In this case, it is undisputed that the Decedent's Last Will is a valid foreign will created under the laws of the Commonwealth of Massachusetts and submitted for probate in New Hampshire, similar to Rubert. However, this case differs from Rubert in that this court determined that the Decedent was domiciled in New Hampshire at the time of her death and similarly, the Essex Probate and Family Court dismissed the petitions for informal and formal probate of a will based on a motion to dismiss for lack of jurisdiction and proper venue. As such, it is clear that Christopher Dow is a pretermitted heir of the Decedent's probate estate and entitled to an intestate share of the Decedent's entire probate estate, even if he was not a pretermitted heir under the laws of the Commonwealth of Massachusetts at the time the Decedent's Last Will was executed in Massachusetts and pursuant to Massachusetts law.

In this case, the court order regarding the determination of domicile was not appealed to the New Hampshire Supreme Court by Leslie Dow.

VIII. The application of RSA 561:1, Distribution Upon Intestacy, and RSA 561:17 provides Christopher Dow is entitled to one-half of the Decedent's probate estate

In this case, it is undisputed that the Decedent was not married at the time of her death, and she was survived by her two adult children, Christopher Dow and Harry R. Dow, IV. This court by order dated April 24, 2019, determined the Decedent was domiciled in the State of New Hampshire at the time of her death.

If the Decedent died intestate, her probate estate descends to her two

living children, in equal shares, pursuant to the provisions of RSA 561:1, II (a), which provides, in pertinent part, as follows:

The real and personal property of every person deceased, not devised or bequeathed... and personally remaining in the hands of the administrator on settlement of his or her account, shall descend or be distributed by decree of the probate court:

...

II. The part of the estate not passing to the surviving spouse . . . or the entire intestate estate if there is no surviving spouse, passes as follows:

- (a) To the issue of the decedent equally if they are all of the same degree of kinship to the decedent...

Further, RSA 561:17, Priority of Legacies, Etc., provides as follows:

The estate, real and personal, not specifically devised or bequeathed, shall first be liable to the payment of the legal charges against the estate and legacies given by the will, and to be applied to make up the share of any child born after the decease of the testator, or of any child or issue of any child omitted or not provided for in the will.